No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

STATE OF HAWAI'I, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PLAINTIFFS IN *IRANIAN ALLIANCES ACROSS BORDERS* V. *TRUMP* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF PLAINTIFFS IN *IRANIAN ALLIANCES ACROSS BORDERS* V. *TRUMP* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are the plaintiffs–appellees in *IAAB* v. *Trump*, No. 17-2232 (4th Cir.). They, along with the plaintiffs in two companion cases, successfully challenged Presidential Proclamation No. 9645, obtaining a preliminary injunction from the U.S. District Court for the District of Maryland and affirmance of that injunction from the en banc U.S. Court of Appeals for the Fourth Circuit on the ground that the Proclamation likely violates the Establishment Clause of the First Amendment to the U.S. Constitution.

The issues presented in this case directly affect *amici* and countless other individuals and organizations throughout the United States and around the world. If the challenged Proclamation is upheld, families will be kept apart, and all Americans will know that our government officially denigrates and excludes Muslims by virtue of their faith.

Amici thus have a strong interest in preserving the injunction here, both to avoid the harms that the Proclamation inflicts on them, and to ensure that this Nation remains true to its constitutional commitments to religious freedom, equal rights, and equal dignity for all without regard to faith or belief.

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. The parties' consents to the filing of this brief are on file with the Clerk's office.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our constitutional order strictly forbids the official disfavoring of anyone based on faith or belief. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Hence, the Religion Clauses of the First Amendment and the Fifth and Fourteenth Amendments' guarantees of equal protection "all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

This "essential commitment to religious freedom" (*Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993)) was no accident. "The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962). Accordingly, the Framers drafted the First Amendment with "awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand." *Id.* at 432. Hence, "the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause." *Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment).

Proclamation No. 9645 reneges on our Nation's commitment to religious freedom by targeting Muslims for denigration and discrimination based solely on their faith. This marking of one religion for exclusion—this ban on Muslims—cannot be justified by the government's asserted interest in national security: The ban is woefully ill-suited to achieving that interest; and the government has made no meaningful changes that sever the policy from the hostility toward Islam that spawned it.

Amici's personal experiences and the increased violence and threats of violence that American Muslims across the country have faced since the ban first issued underscore why the public interest overwhelmingly favors enjoining the ban. Otherwise, *amici* and countless other Americans will have their lives and their intimate relationships disrupted—perhaps permanently—for reasons completely outside their control.

Casting one group as the object of fear, disrespect, and maltreatment based on religion is invidious discrimination and an unconstitutional denominational preference that cannot withstand scrutiny. This Court should affirm the preliminary injunction to preserve the "profound commitment to religious liberty" "that has served [this Nation] so well" (*McCreary Cty.* v. *ACLU of Ky.*, 545 U.S. 844, 882, 884 (2005) (O'Connor, J., concurring)).

ARGUMENT

I. THE PROCLAMATION VIOLATES THE FIRST AMENDMENT.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*,

456 U.S. 228, 244 (1982). Yet by design and in actual effect the Proclamation denigrates, maltreats, and fuels discrimination against American Muslims—and deprives them of the connections to family and community that other Americans take for granted. This official disfavor toward one religion cannot be squared with the First Amendment's guarantees of religious freedom.

A. The First Amendment forbids the government to disfavor and denigrate one faith.

"[T]he Framers of the First Amendment forbade" any "official denominational preference," mandating instead the strict "principle of denominational neutrality." *Larson*, 456 U.S. at 246, 255 (state statute violated Establishment Clause by treating some religious denominations more favorably than others); see also *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) ("[T]he First Amendment means at least this: * * * No person can be punished for entertaining or professing religious beliefs * * *."). Hence, while "the * * * typical Establishment Clause case" involves preferential treatment of one faith or of religion generally, the Establishment Clause also serves an even "more deeply rooted principle: that the government may not act on the basis of *animus* toward a disfavored religious minority." *Int'l Refugee Assistance Project* v. *Trump* ("*IRAP II*"), 883 F.3d 233, 352 (4th Cir. 2018) (Harris, J., concurring).[2]

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[2] See, *e.g.*, *Larson*, 456 U.S. at 244; *Lee* v. *Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington * * * down to the present day, has * * * ruled out of order government-sponsored endorsement

1. The Framers crafted the First Amendment's Religion Clauses against the backdrop of "centuries * * * filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Everson*, 330 U.S. at 8–9. "These practices of the old world were transplanted to and began to thrive in the soil of the new America," with members of disfavored denominations being "jail[ed]," "hounded," and "persecuted." *Id.* at 9–10. The oppression "became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence." *Id.* at 11.

"It was these feelings which found expression in the First Amendment." *Ibid.*; accord *Lukumi*, 508 U.S. at 532–533. The Framers "emphatically disclaimed th[e] European legacy" of "official denominational preference" that had denied religious freedom and equal standing as citizens to persecuted religious minorities. *Larson*, 456 U.S. at 244–245; see, *e.g.*, George Washington, *To the Jews (August 18, 1790)*, *in* THE SEPARATION OF CHURCH AND STATE: WRITINGS ON A FUNDAMENTAL FREEDOM BY AMERICA'S FOUNDERS 110 (Forrest Church ed., 2004) ("the government of the United States * * * gives to bigotry no sanction, to persecution no assistance").

As a consequence, this Court's "Establishment Clause cases * * * have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion." *Lukumi*, 508 U.S. at 532 (citing *Bd. of Educ.* v. *Mergens*, 496 U.S. 226,

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of religion * * * where the endorsement is sectarian * * *."); *Wallace* v. *Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The [Establishment] Clause was * * * designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.").

248 (1990) (plurality opinion); *Sch. Dist.* v. *Ball*, 473 U.S. 373, 389 (1985); *Wallace*, 472 U.S. at 56; *Epperson* v. *Arkansas*, 393 U.S. 97, 106–107 (1968); *Sch. Dist.* v. *Schempp*, 374 U.S. 203, 225 (1963); *Everson*, 330 U.S. at 15–16).

2. So fundamental is the prohibition against official actions disfavoring particular denominations that courts "apply strict scrutiny in adjudging [their] constitutionality." *Larson*, 456 U.S. at 246. On this score, the Establishment and Free Exercise Clauses speak with one voice. See *Lukumi*, 508 U.S. at 546.

Nor may the government skirt the prohibition by mere assertion of a secular rationale, for "the Establishment Clause[ ] extends beyond facial discrimination" to "'forbid[ ] subtle departures from neutrality' and 'covert suppression of particular religious beliefs.'" *Lukumi*, 508 U.S. at 534 (quoting *Bowen* v. *Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.); *Gillette* v. *United States*, 401 U.S. 437, 452 (1971)). "Facial neutrality is not determinative," because the First Amendment bars "governmental hostility which is masked, as well as overt." *Ibid.* Hence, official disfavor toward any religion requires a nonreligious justification that is "genuine, not a sham, and not merely secondary to a religious objective." *McCreary*, 545 U.S. at 864; accord *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000) ("it is * * * the duty of the courts to 'distinguish a sham secular purpose from a sincere one'") (brackets omitted) (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in the judgment)); *Larson*, 456 U.S. at 254 (invalidating law "drafted with the explicit intention of including particular religious denominations and excluding others").

3. The Establishment and Equal Protection Clauses "mirror[]" and reinforce each other in safeguarding against governmental targeting of minorities based on religion or belief. *Grumet*, 512 U.S. at 728 (Kennedy, J., concurring in the judgment); see also *id.* at 715 (O'Connor, J., concurring in part and concurring in the judgment). The Clauses thus share the common objective of prohibiting government from denigrating religious minorities or otherwise promoting or coercing adherence to any "state-created orthodoxy." *Lee*, 505 U.S. at 592.

"In determining if the object of a law is a neutral one" under either the Establishment or the Free Exercise Clause, therefore, this Court employs an "'equal protection mode of analysis.'" *Lukumi*, 508 U.S. at 540 (plurality opinion) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). The Court evaluates governmental action by considering "both direct and circumstantial evidence," including, "among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by * * * the decisionmak[er]." *Ibid.* (citing *Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–268 (1977)). "These objective factors bear on the question of discriminatory object." *Ibid.* (citing *Pers. Adm'r* v. *Feeney*, 442 U.S. 256, 279 n.24 (1979)); see also *McCreary*, 545 U.S. at 862–863 (determination of discriminatory object turns on "readily discoverable fact" and "openly available data support[ing] a commonsense conclusion that a religious objective permeated the government's action").

Simply put, official targeting of disfavored religious groups cannot be reconciled with the fundamental constitutional principle of equal treatment mandated by both the Establishment and Equal Protection Clauses. "Respect for this principle explains why laws singling out a certain class * * * for disfavored legal status or general hardships are rare." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996); see *Lukumi*, 508 U.S. at 532.

B. The Proclamation unconstitutionally disfavors and denigrates Muslims.

The Proclamation cannot be squared with the fundamental constitutional guarantee of equal treatment regardless of religion. The measure "not only [is] a likely Establishment Clause violation, but also strikes at the basic notion that the government may not act based on 'religious animosity.'" *IRAP II*, 883 F.3d at 269 (citing *Lukumi*, 508 U.S. at 532, 535).

1. The Proclamation is the government's latest in a series of unconstitutional attempts to ban Muslims.

Born as a political maneuver to spark and capitalize on religious and racial animus, a ban on Muslims was entrenched into law at the first opportunity after the Administration took office in January 2017 (see Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017)). That first ban was quickly enjoined. See *Washington* v. *Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); *Aziz* v. *Trump*, 234 F. Supp. 3d 724 (E.D. Va. 2017). So the administration issued a second Executive Order with cosmetic alterations. See Pet. App. 148a–172a. But the courts concluded that it was merely a continuation of

the first ban, and enjoined it, too. See *Hawai'i* v. *Trump*, 859 F.3d 741 (9th Cir. 2017); *Int'l Refugee Assistance Project* v. *Trump* (*"IRAP I"*), 857 F.3d 554 (4th Cir. 2017) (en banc).

The government is now trying once again. But the policy remains tainted in both root and branch.

a. From the very beginning, a pledge to ban Muslims was central to Mr. Trump's presidential campaign. See, *e.g.*, Amy Davidson Sorkin, *Donald Trump's First, Ugly TV Ad*, NEW YORKER (Jan. 4, 2016), http://bit.ly/1PH9tp5. Beginning in December 2015, Mr. Trump consistently called for the "total and complete shutdown of Muslims entering the United States." J.A. 162. That message remained on the Trump website long after the election and inauguration, and even after the first and second Executive Orders were enjoined. See Cogan Schneier, *Removal of Trump's Muslim Comments Raises Travel Ban Questions*, NAT'L L.J. (May 11, 2017), https://tinyurl.com/yclzehgl.[3]

Mr. Trump explained: "we're having problems with Muslims coming into the country." J.A. 164. "Islam hates us, * * * [a]nd we can't allow people coming into this country who have this hatred * * *." Theodore Schleifer, *Donald Trump: 'I Think Islam Hates Us,'* CNN (Mar. 10, 2016), http://cnn.it/1RBk6Z4. So "we have to have a ban. * * * It's gotta be a ban." *Presidential Candidate Donald Trump Town Hall Meeting in Londonderry, New Hampshire*, C-SPAN 28:00 (Feb. 8, 2016), http://cs.pn/2kY4f1T.

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[3] The message was abruptly removed on the day of the en banc argument in the Fourth Circuit in *IRAP I*. See Schneier, *supra*.

Mr. Trump thus pledged that, if elected, he would act during his first 100 days in office to ban Muslims from entering the United States. See, *e.g.*, Patrick Healy, *'President Trump?' Here's How He Says It Would Look*, N.Y. TIMES (May 4, 2016), http://nyti.ms/2uFaEmg. He made good on that pledge just seven days after taking office. See Exec. Order No. 13,769 § 3(c).

The initial Executive Order immediately and categorically banned all travel to the United States by nationals of seven countries with populations that are overwhelmingly (most more than 99%) Muslim. See Exec. Order No. 13,769 § 3(c); see also PEW RES. CTR., THE GLOBAL RELIGIOUS LANDSCAPE 45–50 (2012), http://bit.ly/2k4Us8B (reporting population statistics). It banned all non-U.S. citizens from the seven countries, be they students, workers, or tourists; and it applied even to legal permanent residents whose only home is the United States is their only home. See Exec. Order No. 13,769 § 3(c); Michael Edison Hayden & Benjamin Siegel, *Green Card Holders Fall Under Trump's Executive Order*, ABC NEWS (Jan. 28, 2017), http://abcn.ws/2kzvWdV.

At the signing ceremony, the President publicly announced the Order's title, "Protecting the Nation from Foreign Terrorist Entry into the United States," remarking, "we all know what that means." *Trump Signs Executive Orders at Pentagon*, ABC NEWS (Jan. 27, 2017), http://abcn.ws/2kbeqPu. Later that day, he further underscored the policy objective to ban Muslims, announcing that the government would henceforth give Christian refugees priority over Muslim refugees. See David Brody, *Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees*, CBN NEWS (Jan. 27, 2017),

http://bit.ly/2kCqG8M. And Rudolph Giuliani, vice chair of the President's transition team, confirmed that the Executive Order was the implementation of the President's directive to "do" a "Muslim ban" "legally." J.A. 228.

The federal courts recognized, however, that the Order was not "do[ne]" "legally"—that it was the product not of "rational national security concerns" but of "Trump's desire for a Muslim ban" (*Aziz*, 234 F. Supp. 3d at 736; accord *IRAP I*, 857 F.3d at 576–577 (President did not avail himself of national-security apparatus or expertise in developing the ban)). And they enjoined it accordingly. See *IRAP I*, 857 F.3d at 601; *Aziz*, 234 F. Supp. 3d at 736; *Washington*, 2017 WL 462040, at *2.

b. The first Order having been enjoined, the administration endeavored to revise it (Adam Liptak, *Trump Will Issue New Travel Order Instead of Fighting Case in Court*, N.Y. TIMES (Feb. 16, 2017), http://nyti.ms/2kP0qso), updating the lyrics without changing the tune. Declaring, "I keep my campaign promises," the President announced that the redraft would be "very much tailored to what I consider to be a very bad decision" from the Ninth Circuit in *Washington* v. *Trump*, *supra*, explaining: "[W]e can tailor the order to that decision and get just about everything, in some ways, more." *Full Transcript and Video: Trump News Conference*, N.Y. TIMES (Feb. 16, 2017), http://nyti.ms/2kXcFW4.

Other administration officials involved in the effort confirmed this ongoing commitment. For example, White House Senior Policy Adviser Stephen Miller stated that the revised Executive Order would include only "minor technical differences" while producing the "same basic policy outcome." Matt Zapotosky,

A New Travel Ban with 'Mostly Minor Technical Differences'? That Probably Won't Cut It, Analysts Say, WASH. POST (Feb. 22, 2017), http://wapo.st/2mmmECm.

The revised Order, issued in March 2017, thus sought to sidestep court rulings by "expressly exclud[ing] * * * categories of aliens that have prompted judicial concerns." Pet. App. 157a; see, *e.g.*, Jeremy Diamond, *Trump Rails Against Court Ruling Blocking Travel Ban*, CNN (Mar. 15, 2017), http://cnn.it/2rG3oGD (quoting President's statement that "[t]his new order was tailored to the dictates of the 9th Circuit's—in my opinion—flawed ruling"). Otherwise, "'[t]he principles of the executive order remain[ed] the same.'" William Gallo & Victoria Macchi, *Trump Signs New Travel Ban Order*, VOA (Mar. 6, 2017), http://bit.ly/2rZksTy (quoting White House Press Secretary). And lest anyone miss the point, the President stated repeatedly that the revised Order was: "a watered-down version of the first one," "the Travel Ban," "the TRAVEL BAN," "the watered down Travel Ban," and a "watered down, politically correct version" of his original ban.[4]

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[4] @realDonaldTrump, TWITTER (June 3, 2017, 4:17 PM), http://bit.ly/2rzYrwd; @realDonaldTrump, TWITTER (June 13, 2017, 3:44 AM), http://bit.ly/2vJj4Lw; @realDonaldTrump, TWITTER (June 5, 2017, 3:37 AM), http://bit.ly/2uKjVYU; @realDonaldTrump, TWITTER (June 5, 2017, 3:29 AM), http://bit.ly/2svraEu; see also @realDonaldTrump, TWITTER (Apr. 26, 2017, 3:30 AM), http://bit.ly/2gN1HDe (calling Case No. 16-1540 "the 'ban' case"); @realDonaldTrump, TWITTER (Apr. 26, 2017, 3:20 AM), http://bit.ly/2oJNjK8 (calling original Order "the ban"); @realDonaldTrump, TWITTER (Feb. 4, 2017, 1:44 PM), http://bit.ly/2f3F9tQ (same); @realDonaldTrump, TWITTER (Feb. 4, 2017, 5:06 AM), http://bit.ly/2xP334e ("the ban"); @realDonaldTrump, TWITTER (Jan. 30, 2017, 5:31 AM), http://bit.ly

The Fourth and Ninth Circuits recognized that the revised Order was not meaningfully different from the first, and enjoined it, too. See *Hawai'i*, 859 F.3d at 789; *IRAP I*, 857 F.3d at 604–605.

So the President issued a third iteration—the Proclamation—which continues the ban on all immigrants and most visitors from six overwhelmingly Muslim countries (see Pet. App. 131a–137a).

c. By its own terms, the Proclamation implements the second Executive Order. See Pet. App. 124a. And it applies to virtually the same list of Muslim countries. Compare Pet. App. 131a–137a, with Pet. App. 153a–155a. The Proclamation thus "cannot be divorced from" its forebears or from "the cohesive narrative linking it to the animus that inspired it." *IRAP I*, 857 F.3d at 601; see, *e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578, 595 (1987) (Establishment Clause inquiry looks to "the historical context of the statute * * * and the specific sequence of events leading to [its] passage"). As the Fourth Circuit held, "the Proclamation is unconstitutionally tainted with animus toward Islam." *IRAP II*, 883 F.3d at 257.

To be sure, past actions do not "forever taint" new ones. *McCreary*, 545 U.S. at 874. But as the Tenth Circuit has explained, curative efforts "should be (1) *purposeful*, (2) *public*, and (3) at least as *persuasive* as the initial endorsement of religion." *Felix* v. *City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016); see also *McCreary*, 545 U.S. at 871–872 ("new statements of

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/2okbtwc (same). The President's tweets are official U.S. policy. See Elizabeth Landers, *White House: Trump's Tweets Are 'Official Statements,'* CNN (June 6, 2017), https://tinyurl.com/yc99uhy9.

purpose" deemed mere "litigating position" where earlier acts "were not repealed or otherwise repudiated").

Here, the President's insistence on a "total and complete shutdown of Muslims" (J.A. 162) is not readily forgotten. Indeed, the President does not want us to forget.

He regularly complains that his current ban is not "far larger, tougher and more specific" because, "stupidly, that would not be politically correct!" @realDonaldTrump, TWITTER (Sept. 15, 2017, 3:54 AM), https://bit.ly/2zjLHzQ. And he continues to trumpet anti-Muslim animus, including tweeting that "a method hostile to Islam—shooting Muslims with bullets dipped in pig's [sic] blood—should be used to deter future terrorism." *Int'l Refugee Assistance Project* v. *Trump*, 265 F. Supp. 3d 570, 627 (D. Md. 2017); see also Sarah Wildman & Jen Kirby, *Trump Retweeted Anti-Muslim Propaganda Videos from a British Hate Group*, VOX (Nov. 30, 2017), https://tinyurl.com/y73n2749.

Meanwhile, the Proclamation does not repudiate, but instead makes permanent, the unconstitutional and previously enjoined policy. As the Fourth Circuit noted, "President Trump could have removed the taint of his prior troubling statements; for a start he could have ceased publicly disparaging Muslims. But * * * instead of taking *any* actions to cure the 'taint' that we found infected EO-2, President Trump continued to disparage Muslims and the Islamic faith." *IRAP II*, 883 F.3d at 268. Hence, "[n]o reasonable observer could swallow the claim that the" President, as the issuer of the Proclamation, "ha[s] cast off the objective so unmistakable in the earlier" Executive Orders. *McCreary*, 545 U.S. at 872.

d. The government has conceded: "If a president * * * came in and had an executive order that actually did ban Muslims and he said 'I'm doing it for national-security purposes,'" that would not be "a facially legitimate reason under [*Kleindienst* v.] *Mandel*," 408 U.S. 753 (1972), for official action. *International Refugee Assistance Project v. Trump*, C-SPAN 30:29 (May 8, 2017), http://cs.pn/2j4kM4h (oral argument of the Acting Solicitor General on second Executive Order). But the government insists that the Proclamation does not fall for that reason—and indeed that it should not be subject to judicial review—because its "text says nothing about religion, and its restrictions draw no distinctions based on religion." Br. 65.

The Proclamation, of course, reads that way by design: When the President's calls on the campaign trail for a Muslim ban were roundly and almost universally denounced—including being declared "offensive and unconstitutional" by his future Vice President[5]—Mr. Trump responded that because "[p]eople were so upset when [he] used the word Muslim," he would begin "talking territory instead of Muslim" (*Meet the Press*, NBC NEWS (July 24, 2016), http://nbcnews.to/29TqPnp). But he was unequivocal that the change was semantic, not substantive: "So you call it territories. OK? We're gonna do territories. * * * [C]all it whatever you want. We'll call it territories." *The Republican Ticket*, *supra*.

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[5] *The Republican Ticket: Trump and Pence*, CBS NEWS (July 17, 2016), http://cbsn.ws/29NrLqj (quoting then-Gov. Pence); see also Jessie Hellmann, *Trump to Stick with Muslim Ban*, HILL (May 4, 2016), http://bit.ly/1OekCvt (reporting strong criticism by both Republican and Democratic officials).

"Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. Though the Proclamation studiously avoids naming Islam, it, like its predecessor Executive Orders, as a practical matter affects only immigrants and travelers from Muslim-majority countries and their families, friends, and colleagues in the United States, using nationality as a proxy for religion. See Pet. App. 131a–137a.[6]

The restrictions that the Proclamation imposes are also inconsistent with the government's own proffered 'baseline' vetting test for countries, with the consequence that more Muslims and fewer non-Muslims are excluded than the test would dictate. Somalia, an overwhelmingly Muslim country, *passed* the test, yet Somali immigrants are flatly banned. By contrast, no limitations are placed on Venezuelan immigrants, even though Venezuela *failed* the test. Pet. App. 96a.[7]

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[6] The Proclamation places restrictions on only two non-Muslim countries—North Korea and Venezuela—and its real-world effects on those are negligible. Travel from North Korea is already essentially nonexistent: In 2016, before the ban, only nine North Koreans obtained immigrant visas. See Kathryn Casteel & Andrea Jones-Rooy, *Trump's Latest Travel Order Still Looks a Lot Like a Muslim Ban*, FIVETHIRTYEIGHT (Sept. 28, 2017), https://tinyurl.com/ybvvz3ct. And the restrictions on Venezuela apply solely to *visits* by certain *government officials and their families*, not to immigration, and not to Venezuelans generally. See Pet. App. 134a–135a.

[7] The Proclamation purports to justify the different treatment by vaguely invoking "alternative sources for obtaining information" from Venezuela (Pet. App. 134a), without explaining why (or even asserting that) similar arrangements cannot be made for any of the Muslim-majority countries that are subject to the ban. And though Iraq also failed the test and yet avoided

Moreover, the Proclamation affords the same disfavored status to nationals of the Muslim-majority countries regardless of where those individuals reside or whether they have any ongoing connection to a listed country. Even those who, for example, fled a listed country as refugees decades ago and have resided peacefully in a country closely allied with the United States ever since are nonetheless barred. This lack of fit between the ban and the asserted justification of inadequate "information-sharing" and "identity-management" by the targeted countries (see *Hawai'i*, 859 F.3d at 773) underscores that the Proclamation excludes Muslims without regard to real or perceived dangers or to the security or information-sharing practices of their actual home countries.

e. The government treats the evidence that the Proclamation is the President's promised Muslim ban as mere "campaign-trail statements" that may be brushed aside as "inappropriate" to consider. Br. 66. But there is nothing improper about relying on campaign promises as objective evidence of the nature of the official action in fulfillment of those promises—especially when, as here, the government, in the person of the official who made the promises, has so faithfully acted to implement them. See, *e.g.*, *Epperson*, 393 U.S. at 107–108 & n.16 (relying on campaign statement to conclude that "fundamentalist sectarian conviction was and is the [challenged] law's reason for existence"). As the Fourth Circuit explained, "the President's inauguration did not herald a new day." *IRAP*

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restrictions, apparently for diplomatic reasons (see Pet. App. 126a–127a; see also Pet. App. 155a–156a), a Muslim ban does not, as the Fourth Circuit recognized (see *IRAP I*, 857 F.3d at 597), cease to be what it is just because it does not cover every Muslim or every Muslim-majority country.

II, 883 F.3d at 266. Instead, the President wrote his campaign pledge into law, immediately and thrice over, explaining his actions as effectuating the promised ban, because "[t]hese are campaign promises"—"I keep my campaign promises." *Full Transcript and Video, supra.*

For related reasons, the government's warning against "'judicial psychoanalysis'" (Br. 67 (quoting *McCreary*, 545 U.S. at 862)) has no bearing here. "This case is remarkable because it features * * * a governmental decisionmaker using his own direct communications with the public to broadcast—repeatedly, and throughout the course of this litigation—an anti-Muslim purpose tied specifically to the challenged action." *IRAP II*, 883 F.3d at 352 (Harris, J., concurring). "[T]he President's own deputy press secretary made this connection express: he explained that President Trump tweets extremist anti-Muslim videos as part of his broader concerns about 'security,' which he has 'addressed . . . with . . . the proclamation.'" *Id.* at 268 (opinion of the Court). One need not be Sigmund Freud to recognize what the President is doing, for "[i]t is all out in the open." *Id.* at 352 (Harris, J., concurring).

2. The governmental review process does not cure the constitutional violation.

Because this Court "appl[ies] strict scrutiny in adjudging [the] constitutionality" of denominational preferences, petitioners must demonstrate that the ban is "justified by a compelling governmental interest" and is "closely fitted to further that interest." *Larson*, 456 U.S. at 246–247; accord *Lukumi*, 508 U.S. at 546 (actions disfavoring one faith must satisfy "the most rigorous of scrutiny" and are impermissible unless they "advance 'interests of the highest order'" that

"could [not] be achieved by narrower" restrictions (quoting *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978)). And the asserted governmental objective must "be sincere and not a sham." *Edwards*, 482 U.S. at 587. The Proclamation fails in all respects.

a. The Proclamation purports "to protect the security and interests of the United States * * * and [to] address both terrorism-related and public-safety risks." Pet. App. 122a. While no one doubts that combating terrorism to promote national security would be a compelling interest if genuinely demonstrated, the Proclamation's bald assertion of that objective is insufficient to justify denigrating and disfavoring one religion: "To survive strict scrutiny * * * a State must do more than assert a compelling state interest—it must [also] demonstrate that its law is necessary to serve the asserted interest." *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992); see also, *e.g.*, *Shaw* v. *Hunt*, 517 U.S. 899, 915 (1996) (under strict scrutiny, "we have always expected that the [government's] action would substantially address, if not achieve, the avowed purpose").

In other words, the government must show that its asserted interest here is genuinely served by, and genuinely requires, the blanket exclusion of all the persons affected by the ban. Blunt instruments do not suffice: "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 523 (1985)).

Were the rule otherwise, the government could always defeat strict scrutiny by invoking some vague phrase—be it 'preventing terrorism,' 'promoting national security,' advancing "public safety" (*Nat'l*

Treasury Emps. Union v. *Von Raab*, 489 U.S. 656, 677 (1989)), "combating corruption" (*Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 750 (2011)), "protecting children" (*Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989)), or any other interest that, under some set of conditions, might be considered compelling.

The Proclamation at issue is wildly over- and under-inclusive as a means to prevent terrorism, because it does not even try to identify actual or potential terrorists. In fact, it is so poorly fitted to any genuine national-security objective that the sincerity of the proffered rationale is suspect on its face.

The government developed and implemented the first iteration of the policy while willfully excluding any input from the nation's considerable national-security apparatus. Fourteen months later, the government still has not shown that nationals from the targeted countries have been responsible for even one fatal terrorist attack in the United States—because they haven't. See, *e.g.*, Alex Nowrasteh, *Where Do Terrorists Come From? Not the Nations Named in Trump Ban*, NEWSWEEK (Jan. 31, 2017), http://bit.ly/2kWoddx. But the Department of Homeland Security *has* found that restrictions based on nationality do not advance national security. J.A. 244. And a bipartisan group of dozens of national-security officials has concluded that the Proclamation and Executive Orders "would undermine the national security of the United States, rather than making us safer." J.A. 362.

b. The government, however, points to an agency review-and-recommendation process to bolster its asserted national-security rationale. See Br. 64 ("Both the review process and the end result refute the contention that the Proclamation's national-security and

foreign-policy conclusions were adopted in bad faith."); see also *id.* at 58, 60, 65, 66, 69, 70–71. But the government has steadfastly refused to identify the process or its results—even to the courts, in camera, much less to the public. Pet. App. 96a ("While the September 15, 2017 DHS report * * * might offer some insight, the Government objected to the Court's consideration or even viewing of that classified report, making it impossible to know.").[8] Thus, the only assurance that the government is now acting lawfully is its own *ipse dixit*.

Assertions of secret evidence of a secular rationale do not override the manifest evidence of hostility toward Muslims that pervades the record in this case. Cf. *IRAP*, 265 F. Supp. 3d at 627 ("Purposes that can be discerned only if one 'burrows into a difficult-to-access' record do little to 'assure the public that the government is not endorsing a religious view.'" (brackets omitted) (quoting *Felix*, 841 F.3d at 863)).

To make matters worse, the government refuses to offer the courts (or the public) any assurance (or even a bare assertion) that the Proclamation comports with the secret agency reports. See Transcript of Motions Hearing at 48–52, *Int'l Refugee Assistance Project* v. *Trump*, 265 F. Supp. 3d 570 (No. TDC-17-00361) (refusing to say whether there are "material inconsistencies" between Proclamation and reports). Hence, and in light of the findings of the Department of Homeland Security that nationality-based restrictions do not advance national security (J.A. 244),

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[8] In separate FOIA litigation (*Brennan Ctr. for Justice* v. *U.S. Dep't of State*, No. 17-civ-7520 (S.D.N.Y.)), the government has asserted privilege claims over the entirety of the agency reports on which the Proclamation purports to rely.

there simply is no basis to infer that DHS proposed or supported what the Proclamation does. The government's bare statement that "[t]he multi-agency review that produced the Proclamation and its tailored entry restrictions dispel any contention that it is infused with religious animus" (Br. 16–17) are thus infirm ground on which to rest the ban.

Additionally, the means purportedly used by the agencies to arrive at their hidden results and recommendations are not closely fitted to the national-security goal of keeping dangerous individuals out. To the extent that the government gives any indication how it evaluated countries, it says that it employed criteria virtually identical to those that Congress set for participation in the national Visa Waiver Program. See Resp. Br. 11, 46. But a determination under Congress's established criteria that a country cannot participate in the Visa Waiver Program just means that its nationals are to receive individualized reviews if they wish to visit the United States. Here, the criteria are being employed instead to declare that the nationals of the banned countries are ineligible for individualized assessments at all and instead are to be treated categorically—and categorically badly.

What is more, Congress established those criteria for short-term visitors, not for immigrants, who, as the government acknowledges, already "receive more extensive vetting than nonimmigrants" (Pet. App. 129a). In other words, the government has taken the test developed for the important but limited purpose of determining whether visitors should receive individualized assessments, and transmogrified it into the official explanation for ascribing violent anti-American objectives to whole nations of people based on pro-

tected characteristics and then barring them from being united in this country with their loved ones, friends, and colleagues. Cf. *Korematsu* v. *United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) ("[T]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights.").

In making these assertions of dangerousness in gross based on religion rather than evaluating individuals, as our immigration laws, constitutional principles, and national values require, the government "asks us to pretend that we do not recognize what every [American] understands clearly—that this policy is about [religious animus]." *Santa Fe*, 530 U.S. at 315. "We have been down similar roads before. Jewish-Americans during the Red Scare, African-Americans during the Civil Rights Movement, and Japanese-Americans during World War II are examples that readily spring to mind." *Hassan* v. *City of N.Y.*, 804 F.3d 277, 309 (3d Cir. 2015) (invalidating police profiling and surveillance of Muslims based solely on religion). Our Constitution requires more. And American Muslims, and all Americans, deserve better.

II. The Public Interest Favors Enjoining The Proclamation.

The public interest weighs heavily in favor of enjoining the Proclamation. As the Fourth Circuit concluded, the Proclamation inflicts a host of harms on individuals and communities throughout the United States, erecting an "invisible yet impenetrable barrier" that "denies the possibility of a complete, intact family to tens of thousands of Americans." *IRAP II*, 883 F.3d at 271.

By separating families indefinitely, the Proclamation "create[s] not only temporary feelings of anxiety but also lasting strains on the most basic human relationships cultivated through shared time and experience." *Id.* Its "categorical treatment of foreign nationals as potential threats necessarily overlooks their invaluable contributions to our country as individuals," "inhibit[ing] the flow of information, ideas, resources, and talent between the designated countries" and our schools and communities. *Id.* at 271–272 & n.18. And it stigmatizes U.S. citizens and lawful residents based on nationality and religion (see *id.* at 269), inflicting "the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public" (*Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring)).

Amici's own experiences exemplify the harms wrought by the Proclamation.[9] *Amici* include five individual Maryland residents, each of whom is a U.S. citizen or lawful permanent resident who has been separated indefinitely from family members as a result of the Proclamation—even though nothing about *amici* or the family members justifies this forced separation. *Amici* also include Iranian Alliances Across Borders and the Iranian Students' Foundation, two organizations serving Iranian-American youth and others in the Iranian diaspora in the United States. The organizational *amici*, their members, and the individual *amici* have all experienced the divisiveness

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[9] *Amici* submitted sworn declarations in the district court attesting to the facts described here. See *IAAB* v. *Trump*, No. 8:17-cv-02921 (D. Md.), Dkt. Nos. 26-2 to 26-8 (Oct. 6, 2017); Dkt. No. 38-3 (Oct. 13, 2017).

and stigmatization caused by the Proclamation's "anti-Muslim bias" (*IRAP II*, 883 F.3d at 267).

Amicus Jane Doe #5 is a 79-year-old lawful permanent resident from Iran who has lived in Maryland since 2010 with her 90-year-old husband and one of her two sons.[10] She is wheelchair-bound, and she and her husband are both in poor health. Jane Doe #5's other son is in Iran and is indefinitely barred from entering the United States to see his elderly parents as a result of the Proclamation. Given Doe #5's age and infirmity, she will have to remain separated from one or the other of her two sons because of the Proclamation—through no fault of hers or her sons'.

Amicus Jane Doe #1 is a United States citizen who came to this country in 2011 as a refugee, fleeing religious persecution in Iran.[11] She lives in Chevy Chase, Maryland, but her husband, an Iranian national, currently resides in the United Arab Emirates. Because of the Proclamation, Doe #1 and her husband cannot make a life together in the United States. Although Doe #1 is able to visit the UAE to be with her husband,[12] she cannot obtain permanent residency there but instead would have to reapply regularly for temporary status. And the couple cannot return to Iran, where they would be persecuted. Like married couples throughout the world, "[t]heir hope is not to be con-

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[10] See Decl. of Jane Doe #5, *IAAB* v. *Trump*, No. 8:17-cv-02921 (D. Md. Oct. 6, 2017), Dkt. No. 26-7.

[11] See Decl. of Jane Doe #1, *IAAB* v. *Trump*, No. 8:17-cv-02921 (D. Md. Oct. 6, 2017), Dkt. No. 26-4.

[12] When Jane Doe #1 submitted her declaration, she was with her husband in the UAE. She has since returned to the United States.

demned to live in loneliness, excluded from one of civilization's oldest institutions." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2608 (2015). But because of the Proclamation, they cannot fulfill that hope in this country, where Doe #1 is a citizen; and no other place offers them even the possibility of a safe, permanent home together.

Amicus John Doe #6 is a lawful permanent resident from Iran who has lived in the United States for five years.[13] He is an engineer whose company performs major jobs as a contractor for the U.S. government. His wife is also Iranian; she works as a researcher at the National Institutes of Health. They have built their life together in Maryland. Doe #6's mother-in-law, who currently resides in Iran, applied for a visa to visit, but her application was not fully processed before the Proclamation took effect, and she has since been denied both a visa and a waiver under the Proclamation.[14] Doe #6's wife is devastated. The Proclamation keeps her apart from her mother, while both she and Doe #6 are contributing their professional skills to serve their adopted country and the U.S. government.

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[13] See Decl. of John Doe #6, *IAAB* v. *Trump*, No. 8:17-cv-02921 (D. Md. Oct. 6, 2017), Dkt. No. 26-8.

[14] When Doe #6 submitted his declaration in the district court, visa applications for his mother-in-law and sister-in-law had not been processed. His sister-in-law was granted a visa while the second ban was enjoined. After the Proclamation went into effect, however, his mother-in-law was denied a visa under it—showing the cruel and fickle consequences of the ban. See Pls.-Appellees' Notice Regarding Pls., *IRAP* v. *Trump*, Nos. 17-2231, 17-2232, 17-2233, 17-2240 (4th Cir. Dec. 6, 2017), Dkt. No. 160; Visa Denial Letter, *IAAB* v. *Trump*, No. 8:17-cv-02921 (D. Md. Feb. 2, 2018), Dkt. No. 65-2.

The other individual *amici* have similarly been separated from their loved ones and stigmatized as a result of the Proclamation. The Proclamation bars *amicus* Jane Doe #2, a U.S. citizen who lives and works in Maryland, from uniting in this country with her fiancé, an Iranian national. Despite being born and having lived in the United States her whole life, Doe #2 now feels that she is treated as an outsider in her own country.[15] *Amicus* Jane Doe #3 has been a U.S. citizen since 2004 and is a special-education teacher in the Montgomery County Public Schools, where she has worked since 2006.[16] Other than her youngest brother, who lives in Iran, Doe #3's entire family lives in the United States as citizens or lawful permanent residents. As a result of the Proclamation, however, Doe #3 cannot reunite with her brother in the United States; he remains in Iran, separated from the rest of the family.

Several of the individual *amici* have also expressed fear of violence.[17] And for good reason: As the former Assistant Attorney General for Civil Rights testified before Congress: "[P]olicies singling out protected groups can normalize hate and legitimize hate-motivated violence directed at Muslims or people perceived to be Muslim." *Responses to the Increase in Religious Hate Crimes: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 5 (2017) (statement of Vanita Gupta, President, Leadership Conference on Civil and Human Rights), http://bit.ly/2xa29Bp. Since the

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[15] See Decl. of Jane Doe #2, *IAAB* v. *Trump*, No. 8:17-cv-02921 (D. Md. Oct. 6, 2017), Dkt. No. 26-5.

[16] See Decl. of Jane Doe #3, *IAAB* v. *Trump*, No. 8:17-cv-02921 (D. Md. Oct. 6, 2017), Dkt. No. 26-6.

[17] See Decl. of Jane Doe #2, ¶ 10; Decl. of Jane Doe #3, ¶¶ 9, 10; Decl. of Jane Doe #5, ¶¶ 8, 9.

Muslim ban was first implemented, acts of anti-Muslim violence have increased, including:

- On January 28, 2017, the day after the President issued the first Executive Order, an arsonist destroyed a Texas mosque, believing that the worshippers there were terrorists. See *Man Indicted for Hate Crime for Texas Mosque Fire*, CBS NEWS (June 23, 2017), http://cbsn.ws/2wcTtWP; *Investigator: Suspect in Texas Mosque Fire Feared Muslims*, U.S. NEWS & WORLD REP. (Mar. 10, 2017), http://bit.ly/2vJp8jk.

- On March 19, two weeks after the President issued the second Executive Order, a note left at an Islamic Center in Iowa warned that the "new sheriff in town—President Donald Trump"—was "going to cleanse America" and would "start with you Muslims"; the note threatened that the President was "going to do to you Muslims what Hitler did to the Jews." Jason Le Miere, *Trump Will Do to Muslims 'What Hitler Did to the Jews,' Claims Hate Crime Note Sent to Iowa Mosque*, NEWSWEEK (Mar. 20, 2017), http://bit.ly/2f7XExn.

- On September 15, one week before the President issued the Proclamation, members of a hate group shouted "We love Donald Trump, you wicked devil!" outside a mosque in Ohio while holding signs stating "Homos and Muslims go to hell." Esther Honig, *Hate Group Demonstrates Outside Columbus Mosque: 'We Love Donald Trump,'* WOSU PUBLIC MEDIA (Sept. 15, 2017), https://tinyurl.com/y7wrxccd.

Anti-Muslim hate crimes are not new. But skyrocketing threats and violence coincide with the administration's demonization of Muslims.[18]

The Proclamation has also harmed the institutional *amici* and the young people whom they serve and represent. *Amicus* IAAB's primary function is mentoring and building a community of young Americans who are part of the Iranian diaspora.[19] *Amicus* ISF is a student group at the University of Maryland, affiliated with IAAB, that strives to raise awareness about Persian culture, dance, tradition, holidays, and

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[18] A recent study documented 302 incidents of violence or hate speech directed at Muslim, Arab, and South Asian communities between November 2016 and November 2017, an over 45% increase from the previous year. Of this number, 248 (82%) were motivated by anti-Muslim sentiment. Moreover, 213 included actual violence—a 64% increase over last year. And approximately 1 out of every 5 of these incidents involved perpetrators who specifically invoked President Trump's name, policies, or campaign slogans. See *Report: Communities on Fire: Confronting Hate Violence and Xenophobic Political Rhetoric*, South Asian Americans Leading Together (SAALT), https://tinyurl.com/ycllxzd2; see also *CAIR Report Shows 2017 on Track to Becoming One of Worst Years Ever for Anti-Muslim Hate Crimes*, COUNCIL ON AM.–ISLAMIC RELATIONS (July 17, 2017), http://bit.ly/2uCpFqR (reporting a 91% increase in the number of anti-Muslim hate crimes during the first half of 2017); Christopher Ingraham, *American Mosques—and American Muslims—Are Being Targeted for Hate Like Never Before*, WASH. POST (Aug. 8, 2017), http://wapo.st/2x3nCty (documenting at least 85 anti-Muslim incidents at mosques during the first half of 2017).

[19] See Decl. of Mana Kharrazi, *IAAB* v. *Trump*, No. 8:17-cv-02921 (D. Md. Oct. 6, 2017), Dkt. No. 26-3.

history, as well as modern-day Iran and issues facing Iranian-Americans.[20]

The young people who participate in and rely on these organizations understandably feel that their community is under attack.[21] And as members of the Iranian diaspora in the United States, they are confronted with a policy that would potentially bar any additions to their numbers, meaning they "may well be the last of their kind." @ACLUVA, TWITTER (Dec. 8, 2017, 12:13 PM), https://tinyurl.com/ydgjrt4b (statement of Mana Kharrazi after Fourth Circuit argument in *IRAP II*).

At summer camps that IAAB runs for high-school and middle-school students, the counselors have had to spend "a considerable amount of time * * * addressing [their] campers' feelings of fear, self-hate and lowered self-esteem" arising from the President's anti-Muslim statements on the campaign trail and his subsequent imposition of the Muslim ban.[22] The stress caused by this kind of discrimination is associated with long-lasting mental-health effects, including depression and post-traumatic stress disorder. See, *e.g.*, *Racism and Mental Health*, AM. PSYCHIATRIC ASS'N, (Oct. 6, 2017), https://tinyurl.com/y72wj29x.

For college students, the Proclamation has had numerous disruptive effects on university life, including generating feelings of anxiety in the student body, particularly among students from the countries covered by the Proclamation, thus impairing students'

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[20] Decl. of Naseem Pashai, *IAAB* v. *Trump*, No. 8:17-cv-02921 (D. Md. Oct. 13, 2017), Dkt. No. 38-3.

[21] Pashai Decl. ¶ 6.

[22] Kharrazi Decl. ¶ 12.

ability to study and learn.[23] Some confront the prospect of graduating from college without having their parents be able to attend commencement to celebrate with them.[24]

The Proclamation also hinders the educational and cultural interests of our country. *Amicus* IAAB's ability to fulfill its mission of strengthening the Iranian diaspora through leadership and educational programming is compromised by its inability to bring scholars from Iran and the broader diaspora community to its conferences. And the Proclamation has "impair[ed] the University of Maryland's ability to carry out its mission of teaching, research, and support for the economic development of Maryland as well as the United States."[25] The Proclamation also threatens the University's enrollment by reducing its ability to attract talented students, researchers, and faculty from abroad.[26]

These harms to *amici*, representing only a minute fraction of the more than three million American Muslims affected by the Proclamation and suffering similar injury, significantly outweigh any interest that the government may have in enforcing the President's unconstitutional Proclamation. Cf. *IRAP II*, 883 F.3d at

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[23] See Decl. of Wallace Loh, President of the University of Maryland at College Park, *IAAB* v. *Trump*, No. 8:17-cv-02921 (D. Md. Oct. 13, 2017), Dkt. No. 38-4. Dr. Loh filed his declaration supporting the plaintiffs in the district court in *IAAB* v. *Trump* to detail the effects of the Proclamation on the University of Maryland and its students.

[24] Pashai Decl. ¶ 6.

[25] Loh Decl. ¶ 10.

[26] Loh Decl. ¶ 17.

271 ("We conclude that it cannot be in the public interest for the President to violate the Establishment Clause."). As the district court concluded, "[w]hen the government chooses sides among religions, the 'inevitable result' is 'hatred, disrespect, and even contempt' from those who adhere to different beliefs." *IRAP*, 265 F. Supp. 3d at 630 (quoting *Engel*, 370 U.S. at 432–433). It surely is not in the government's interest to "sow seeds of division in our nation." *Ibid.*; see *Grumet*, 512 U.S. at 728 (Kennedy, J., concurring) ("The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.").

In sum, the Proclamation has inflicted and will continue to inflict substantial harm on *amici* and all the many similarly situated U.S. citizens and lawful permanent residents who have family members barred from entry into this country. Those harms outweigh any purported harm to the government from a preliminary injunction.

CONCLUSION

The government "may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion." *Lukumi*, 508 U.S. at 547. Declaring a religion's adherents categorically unworthy even to visit this country is "precisely the sort of official denominational preference that the Framers of the First Amendment forbade" (*Larson*, 456 U.S. at 255). This "bare * * * desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest," much less a *compelling* one. *Romer*, 517 U.S. at 634 (quoting *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973)).

The preliminary injunction should be affirmed.

Respectfully submitted.

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